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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1050

LEE D. TARVESTAD AND GEORGE A. WYUM,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (5 R. 1-15)[1] is not yet reported.

[1] "T." preceded by the volume number refers to the 25-volume trial transcript.
"1 R." refers to the one-volume court of appeals record which contains the indictment, the preliminary motions and the rulings made as to them, and other allied papers.
"2 R." refers to a transcript of a pretrial attempt by the defense to interrogate the prosecution (see Pet. 17-20).
"3 R." refers to requested instructions and the exceptions taken thereto.
"4 R." contains the court's instructions to the jurors.
"5 R." contains the opinion of the court of appeals. All such volumes are on file with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 6, 1970, and on January 9, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government relied upon tainted evidence at trial.
2. Whether the instructions were prejudicial.
3. Whether the defense were denied statements of government witnesses to which they were entitled under 18 U.S.C. 3500.
4. Whether the trial court excluded evidence of petitioner Wyum's good faith.
5. Whether the testimony of a Securities and Exchange Commission accountant as to the results of his audit of the corporate books and his tracing of the investors' checks was proper.
6. Whether the government met its burden of proving petitioner Tarvestad's mental responsibility.

STATEMENT

After a jury trial in the United States District Court for the District of North Dakota, petitioners were convicted on each count of a twenty-two count indictment. Ten counts charged the fraudulent sale or transmission of securities and six counts charged the sale of non-registered securities (counts 1-10, 16-

21, 15 U.S.C. 77e, 77q(a), five counts charged mail fraud (counts 11-15, 18 U.S.C. 1341), and one count charged conspiracy (count 22, 18 U.S.C. 371). On November 28, 1967, each petitioner was sentenced to concurrent sentences on the first twenty counts of eighteen months' imprisonment, and to five years probation on the remaining two counts; probation was made consecutive to the term of imprisonment (1 R. 193-194). The court of appeals affirmed (5 R. 1-15).

The evidence is summarized in the opinion of the court below (5 R. 1-15). Briefly, it showed that during the period 1963-1965, the two petitioners were the controlling stockholders in a North Dakota corporation, Dalco American Enterprises, Inc., a lumber firm which built homes and engaged in other types of light construction. Through a division and a subsidiary of this corporation, petitioners sold securities to the public (1 T. 47, 49, 63). Such sales were made by petitioners personally or through a sales force trained by them (2 T. 227-233, 21 T. 2061). The securities were of three types: unsecured promissory notes carrying a 6½ to 7% rate of interest (19 T. 2429), shares of stock in their own corporation, and, later, "assignments" of fractional interests in mortgages which the corporation was thereafter to acquire (1 T. 47). The sales of the three types of securities were accompanied by representations (proved at trial to be false) as to the net worth of petitioners' corporation and the safety of the sums invested in the corporation and its securities (1 T. 65, 73, 14 T. 1799, 16 T. 2026-2027). For example, petitioners failed in a substantial man-

ner to maintain the reserve funds which the investors were told would be maintained to safeguard their investments (13 T. 1677, 16 T. 2030, 17 T. 2095, 2098). Nor were the investments which petitioners' corporation made with the public's money insured by any government agency, as promised in the sales literature (15 T. 1830-1832, 22 T. 2675). In addition, some of the checks received from public investors were not deposited to the credit of the corporation, but, instead, went into the personal bank accounts of the petitioners (14 T. 1722, 1771, 20 T. 2467-2469, 22 T. 2661, 2675, 2678-2679). Such interest as was paid to investors in the mortgage "assignments" came from the funds of other investors (13 T. 1699).

The three types of securities were extensively advertised. Some sales involved the use of the mails, and some sales were made in states other than North Dakota (2 T. 243, 21 T. 2601, 2672, 22 T. 2662). On at least two occasions petitioners had been told by a Securities and Exchange Commission attorney of the need to register such securities with the Commission; but the securities were never registered (21 T. 2589-2592, 2602-2603, 2612, 25 T. 3046-3048). In all, the public invested approximately $900,000 in the three types of securities (1 T. 51, 13 T. 1674). In June 1965, when petitioners' corporation was placed in involuntary bankruptcy, its debts exceeded its assets by approximately $1,500,000 (2 T. 156).

ARGUMENT

The court of appeals affirmed petitioners' convictions after having "explored the entire record and the multitude of contentions" raised by petitioners and finding no prejudicial error. The court confined its written opinion, however, to the six counts charging the sale of unregistered securities on the view that where "prejudice does not patently appear" the concurrent sentence rule has continuing vitality under *Benton* v. *Maryland*, 395 U.S. 784. While we believe that this approach was entirely appropriate, we have undertaken, for the convenience of the Court, to meet each of petitioners' substantive contentions.

1. In August 1965, at a hearing in bankruptcy, petitioners were questioned about their status in the corporation and various phases of its operations, including a question about a dishonored check on which an investor from Minot, North Dakota had stopped payment. To most such questions, petitioners claimed the privilege against self-incrimination. However, they were ordered to and did answer some of the questions, and petitioner Wyum acknowledged that he thought his company had received the North Dakota check. He refused, on the ground of self-incrimination, to state whether he knew that payment had been stopped; this refusal was sustained (1 R. 175-177).

Subsequently, petitioners claimed that the indictment rested "solely" on evidence illegally obtained at the bankruptcy proceedings, and the trial court

granted a pretrial hearing to consider that claim (1 R. 157-160, 226). At this hearing, the defense asked the prosecutor whether the trustee who had made the inquiries at the bankruptcy hearing had testified before the grand jury, and if the prosecution had used the information furnished at the bankruptcy hearing for leads in obtaining the indictment (2 R. 2-3). The prosecutor objected to any interrogation about his efforts, but stated that the evidence before the grand jury was "other than that contained in the testimony taken before the referee" (2 R. 4). No transcript had been made of the trustee's grand jury testimony, but the prosecutor believed that the trustee had not related petitioners' testimony at the August 1965 bankruptcy hearing. He stated that other witnesses besides the trustee had testified before the grand jury (2 R. 6-7). When the defense presented no evidence in support of its motion to quash the indictment, the court denied the motion (2 R. 9).

At trial, reference was made to the dishonored check from the Minot, North Dakota investor. This occurred during the testimony of the Commission accountant, Rome, as to what the corporate books showed. Counsel for petitioner Wyum then moved for a mistrial. The court denied the motion but ruled that none of the information obtained from petitioners at the bankruptcy hearing could be used by the prosecution at trial (14 T. 1704-1706).

As the court of appeals held (5 R. 12), the government complied with this order. The information petitioners gave the trustee under protest at the bankruptcy hearing was limited in scope, and did not

identify the victims listed in the twenty-one substantive offenses charged. The bearing of the dishonored check was slight. In any event, petitioner furnished no "lead" to the check at the bankruptcy hearing; the government's information about it came from the corporate records. Similarly, there was no connection between the trial evidence of the interstate sale of securities and petitioners' bankruptcy hearing answers. Those sales were testified to by corporate employees and by the victims, whose names were obtained from corporate records (*e.g.*, 2 T. 227-233, 243, 3 T. 284, 22 T. 2662, 25 T. 3032). In fact, it was stipulated at trial that petitioner Wyum had opened a Minnesota bank account (14 T. 1722-1723), and Wyum testified that some of the checks given to him by investors who were residents of that state went into that account and were used by him for a personal investment (22 T. 2661, 2677-2679). Accordingly, it is clear that such information as petitioners did give to the trustee, over protest, had no bearing on the return of the indictment [2] nor the convictions at trial.

2. Petitioners' challenges to the instructions (Pet. 22-23) were comprehensively dealt with by the courts below and properly rejected as nonprejudicial (5 R. 10). Thus, while the trial court did charge

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[2] Petitioners do not now challenge the validity of the indictment on this ground. At all events, as the court of appeals held, an indictment is not invalid because it may have been based in part on evidence that would have been inadmissible at trial. *Costello* v. *United States*, 350 U.S. 359, 364; *Lawn* v. *United States*, 355 U.S. 339; *United States* v. *Andrews*, 381 F. 2d 377 (C.A. 2), certiorari denied, 390 U.S. 960.

that "[t]here is nothing peculiarly different in the manner in which a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them" (Pet. 3, 22-23), the impact of this comment was insubstantial when viewed against the instructions in their entirety. On several occasions in its instructions the trial court made clear that all elements of the offenses charged had to be proved beyond a reasonable doubt. It properly defined a reasonable doubt as a fair doubt based upon reason and common-sense and arising from the state of the evidence, and correctly stated that proof beyond a reasonable doubt is established if the evidence is such that the jurors would be willing to rely and act upon it in the most important affairs of their own lives. The jury was cautioned that a defendant was not to be convicted on mere suspicion or conjecture (4 R. 2, 10). Indeed on the page where the portion of the instruction objected to appears (4 R. 59), the trial court cautioned that if petitioners "* * * not [be] proved guilty beyond a reasonable doubt * * * say so."

3. There is no substance to the contention (Pet. 24-28) that petitioners were denied statements of witnesses—particularly government witness Rome—to which they were entitled under the "Jencks Act", 18 U.S.C. 3500.

The trial transcript shows that the defense was furnished copies of the witnesses' pretrial statements (*e.g.*, 4 T. 467-468, 500, 8 T. 1007, 9 T. 1104). When Rome finished testifying, the prosecution told the

court it had no such statements of Rome's to furnish the defense. The court, nevertheless, ordered the government to produce all reports Rome had made, for its own *in camera* inspection. When this was done, some of the reports were furnished to the defense and the others were sealed (14 T. 1743-1746, 1752-1756). One report which the court did not furnish to the defense was a Commission "Criminal Reference Report". This report had not been signed; the government stated that Rome had merely furnished figures for inclusion in it, and that the report itself was for internal use only (14 T. 1752-1753).[3] Other reports concerned brief interviews which Rome had had with some witnesses, usually by telephone, as a minor part of his auditing duties. (13 T. 1667, 14 T. 1783-1784; cf. Pet. 27-28). There is no indication that any of these reports are fairly attributable to agent Rome as his "statement" within the intendment of 18 U.S.C. 3500, cf. *Clancy* v. *United States*, 365 U.S. 312, or, on this record, that the trial judge abused his discretion with regard to the production of statements of government witnesses. See *United States* v. *Augenblick*, 393 U.S. 348, 355.

4. It is contended the trial court "repeatedly excluded" profferred testimony about statements allegedly made to petitioner Wyum by Herzog, his corporate subordinate, regarding the financial condition of the corporation (Pet. 29-30), and thereby deprived Wyum

[3] The defense does not appear to have made any request for the production of this report (see 14 T. 1752-1754, 1784).

of a fair trial on the issue of his state of mind. There is, however, no factual basis in the transcript for the claim. While it is true that the court occasionally excluded such evidence as hearsay (20 T. 2487-2489), the transcript shows that Wyum repeatedly invoked Herzog's name and Herzog's information as being the cause of his belief in the honesty of his representations to investors. (See, *e.g.*, 20 T. 2458, 2491-2492, 22 T. 2500, 2514-2515, 2653, 2660, 2666.)[4] Moreover, the jury was instructed on the effect of honest errors of judgment and a good faith belief in the success of an enterprise (4 R. 26, 46).[5]

5. The contention that the government was allowed to introduce summaries of matters not in evidence through Rome's testimony is insubstantial. Rome testified extensively about what the corporate books showed and about his ability to trace checks

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[4] On one occasion, for example, Wyum's counsel inquired about Wyum's state of mind concerning the protection being given to investors, after speaking with Herzog. Petitioner Wyum replied that he "felt that everything was being taken care of the way it should be" (20 T. 2489).

Herzog, who was called as a government rebuttal witness, denied having given petitioner Wyum such assurances. He stated, instead, that he had told Wyum of the corporation's perilous financial condition (24 T. 2941).

[5] *Phillips* v. *United States*, 356 F. 2d 297 (C.A. 9), relied on by petitioners, is not in point. In that case, a conviction was reversed because there had been no showing that hearsay complaints, received by subordinates, had been called to the attention of an individual defendant. In the present case, there is no assertion that subordinates suppressed complaints, and petitioners, who attended board of director meetings, were in the best position to know the status of their company and its needs (16 T. 1969, 1987, 20 T. 2477-2478, 2484).

made out to the corporation to petitioners' bank accounts (13 T. 1652-1695, 14 T. 1696-1802, 15 T. 1803-1827). Based on his examination, he was able to prepare charts or summaries based on the corporate records and the records of the personal bank accounts which had been admitted in evidence (13 T. 1609-1612, 14 T. 1724). From these charts, the jury could ascertain how much the corporation collected from the public investors (13 T. 1674, 14 T. 1696) and how much went to each petitioner. Rome repeatedly testified that his summaries were based on his audit of the exhibits of record (*e.g.*, 13 T. 1658, 1687, 14 T. 1698, 1703, 1714-1720, 15 T. 1807, 1815). Some of his compilations were corroborated by other evidence, furnished by one of petitioners (16 T. 2026, 2028), and by one of their former employees, who was able to connect the issuance of corporate securities with the deposit of checks from the investors to petitioners' personal accounts (24 T. 2949, 25 T. 3032). In these circumstances, the summaries, based upon competent evidence already before the jury, were admissible as a convenient and desirable aid to a jury's understanding of a long and complicated set of facts. *United States* v. *Rath*, 406 F. 2d 757 (C.A. 6), certiorari denied, 394 U.S. 920; *Swallow* v. *United States*, 307 F. 2d 81, 84 (C.A. 10), certiorari denied, 371 U.S. 950. Moreover the trial court instructed that the charts were matters of convenience, to be used by the jurors only to the extent that they found that they were based on the evidence admitted at trial (4 R. 48).

6. Petitioner Tarvestad argues (Pet. 38-40), that the government had the burden of proving his mental responsibility beyond a reasonable doubt. The trial court so instructed (4 R. 53-56).[6] Nor did the government fail to meet its burden in this respect.

Before trial, at the request of the defense, petitioner Tarvestad was committed for a medical examination by federal authorities (1 R. 79-81). The medical facility submitted a report to the trial court stating its opinion that Tarvestad was sane and rational. The court thereupon found him competent to stand trial (1 R. 115-119, 123-124). At trial, defense psychiatric evidence was presented (18 T. 2174, 2293). It was contradicted by a government psychiatrist who had examined petitioner Tarvestad and the records kept of his mental condition while he was a patient at the federal medical facility from November 1966 to February 1967 (24 T. 2856, 2866-2867). The government doctor described the drug placidyl—which Tarvestad had taken during 1964 and 1965 and which was the basis of Tarvestad's defense of mental incompetency (see Pet. 13)—as being similar to phenobarbital.[7] In addition, lay witnesses testified that Tarvestad appeared to be normal dur-

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[6] Accordingly, there is no reason here to reach the alleged conflict between the Third and Eighth Circuits (Pet. 38-39) regarding when the defendant has sufficiently introduced evidence of insanity as to require the government to prove sanity beyond a reasonable doubt.

[7] It was also described as a non-barbiturate sedative, with a sleep inducing effect, a sleeping pill designed to reduce tension (17 T. 2105-2106).

ing the period encompassing the offenses charged (23 T. 2826-2830, 2836-2841, 24 T. 2936-2939). During this time, petitioner Wyum noticed nothing unusual about petitioner Tarvestad's behavior (22 T. 2709). Tarvestad was able to recall past events (15 T. 1880), and acknowledged that he was active in the operation of the corporation and that he arranged the newspaper advertisements for the sales of securities to the public (16 T. 1986, 1996, 2020). In short, as the court below held, "the evidence of competency was properly submitted to the jury" under proper instructions (5 R. 15).[8]

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[8] It is further asserted that the defense was deprived of the right to examine notes which Rome used to refresh his recollection (Pet. 32-33). It appears that Rome testified from exhibits he had made, summaries of his audits. His exhibits (Nos. 291-296) were themselves admitted in evidence. We have been unable to find any indication that Rome needed to have his memory refreshed by an examination of any record which was not placed in evidence. Moreover, the court seems to have been aware of the correct rule, that counsel for the other side could examine such memorandum, if used to refresh recollection, even though it was not received (20 T. 2482).

As to the prejudicial publicity which petitioner now asserts occurred (Pet. 35), petitioner fails to indicate when and how such "virulent and inflammatory * * * publicity" (*id.*) was raised at trial and did not raise the point on appeal below. The court cautioned the jurors several times (*e.g.*, 1 T. 107, 13 T. 1695, 16 T. 2047, 20 T. 2535) not to discuss the case. Nor is there any indication at trial that defense counsel brought the matter of prejudicial publicity to the court's attention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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